

Settlement Meeting #1 - July 12, 2018
Maine v. Pruitt, Civil Action No. 1:14-cv-264-JDL

Participants:

Maine Department of Environmental Protection and Office of the Attorney General
EPA Office of General Counsel, Office of Water and Region 1

EPA Proposed Agenda (times approximate)

- Opening remarks (5 mins)
 - EPA (David Fotouhi, Deputy General Counsel)
 - State Representatives
- Overview of agenda (<5 mins)
 - EPA (Steve Neugeboren, EPA Associate General Counsel for Water)
 - Discussion (All)
- Confirmation/clarification of Maine's settlement proposal (5 mins)
 - State Representatives
- Presentation and discussion of desired outcomes, guiding principles and terms of EPA settlement offer (30 Mins)
 - Presentation - EPA (Steve Neugeboren)
 - Discussion (All)
- Description of State's planned legislative and regulatory process for adopting site-specific criteria (State Representatives) (15 mins)
- Next Steps/Preparation for next call (time remaining) (All)

- Brock
- Reid
- B. Kari
- Du ?
- Mark Mark
- Tika Hagem

1. Substantive Terms of Maine's Settlement Proposal (to be confirmed/clarified by State):

- EPA withdraws its designated use approvals and HHC disapprovals.
- EPA determines that its pre-2004 approvals of Maine's designated uses and HHC apply in tribal waters.
- EPA revokes the federal HHC.
- Maine enacts legislation authorizing DEP to adopt site-specific HHC for sustenance fishing, and adopts through rulemaking and legislative approval site-specific HHC for certain waters running through or adjacent to the Southern Tribes' reservations based on EPA's 142 g/day national default for sustenance consumers.
- EPA approves Maine's site-specific HHC.
- Possible future process to determine FCR for Northern Tribes' waters, including gathering current consumption information.

2. EPA's Proposed Settlement Offer

- **EPA's Desired Outcome and Guiding Principles for Offer:**
 - **Desired Outcomes:**
 - After implementation of the Agreement, site-specific criteria adopted by the State and approved by EPA protective of sustenance fishing for waters in Maine with acknowledged tribal sustenance fishing are the applicable criteria for CWA purposes; EPA approves the States' general fishing designated use and withdraws its 2015 decisions on the State's standards and the federal criteria related to sustenance fishing.
 - The settlement is durable - it results in the termination of the current litigation, reduces the likelihood of future litigation or, in the event of such litigation, simplifies and/or reduces the issues to be adjudicated and places both EPA and the State in the strongest posture to successfully defend challenges to State and federal actions under the agreement.
 - **Guiding Principles:**
 - The settlement provides an opportunity for the State and EPA to shift focus away from past disputes that have resulted in protracted litigation and would likely continue to do so (e.g., interpretations of the meaning of the Settlement Acts and their relevance to implementation of the CWA). Instead, EPA believes the agreement should reflect implementation of the State's and EPA's core authorities and exercise of discretion under the "normal" CWA process. Exercise of those authorities based on the requirements of section 303(c) of the CWA, EPA regulations and analogous State laws and sound scientific rationale will most effectively achieve the public health goals of the governing statutes and regulations, receive deference from the courts and therefore are

most likely to survive any legal challenges to State and federal actions taken pursuant to the agreement.

- State and EPA actions comply with procedural and substantive requirements of the federal Administrative Procedure Act (APA) and analogous State laws, including that decisions are adequately supported by their administrative records.
- The State's and EPA's actions work in tandem to achieve the desired outcomes in a step-wise coordinated fashion through parallel administrative proceedings. As proposed by EPA, this structured process culminates in EPA's withdrawal of prior regulatory actions based upon, and justified by, the State's adoption and EPA's approval of the State's site-specific criteria protective of sustenance fishing for waters currently covered by the federal criteria. A sustainable withdrawal of prior actions therefore entails state adoption of criteria that are geographically co-extensive with the waters currently covered by the federal criteria (i.e., reservation and trust waters for the Northern and Southern Tribes).
- The Agreement contains mechanisms to provide adequate assurance that the State and EPA they will carry out the actions committed to in the Agreement.

- **Proposed Terms:**

- State and EPA actions resulting in State's site-specific human health criteria becoming the approved applicable water quality standards under the CWA protective of tribal sustenance fishing:
 - After enactment of any necessary authorizing legislation and shortly after Maine publishes a proposed rule with site-specific human health criteria based on EPA's national default FCR of 142 g/day for sustenance fishing and a scientifically defensible methodology for deriving human health criteria, EPA proposes withdrawal of its federally promulgated human health criteria for the waters covered by the State's proposed rule;
 - The preamble to EPA's proposed withdrawal rule would state that if Maine adopts scientifically defensible site-specific human health criteria based on a FCR of 142 g/d or greater, EPA will withdraw (1) its prior approval of MIA as a designated use under the CWA; (2) its prior approval of the State's fishing designated use as including an explicit sustenance fishing use; and (3) the Administrator's determination under section 303(c)(4)(B) of the CWA;

- After the State completes its regulatory adoption and legislative approval process and submits approvable site-specific HHC based on a FCR of 142 g/day or greater, and after consideration of public comment, EPA will approve the State's general fishing designated use and site-specific human health criteria, withdraw the federally promulgated HHC for waters covered by the State's site-specific human health criteria, and withdraw EPA's prior use designation approval actions and Administrator's determination (EPA's prior disapproval action would not need to be expressly withdrawn, as it will have been superseded by EPA's approval of the State's site-specific criteria).
- In order for EPA to have a sound and defensible legal and technical basis to withdraw its prior actions in full, the State's site-specific criteria would need to apply to all the waters covered by the current federal criteria (i.e., reservation and trust waters for the Northern and Southern Tribes).

○ Form of Agreement

- Settlement Agreement or Consent Decree, to be determined consistent with policies of the U.S. Department of Justice.
- Case held in abeyance or dismissed without prejudice pending completion of the above actions.